

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 53

LAWRENCE C. KINGSLAND, COMMISSIONER OF PATENTS,
Petitioner,

vs.

VERNON M. DORSEY,
Respondent

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PETITION FOR REHEARING

The decision of this Court was announced November 21, 1949.

This Court affirmed the opinion of the District Court which had been reversed by the United States Court of Appeals for the District of Columbia.

This Court held that it was the Commissioner of Patents and not the courts that Congress made primarily responsible for determination of the issues presented. With deference,

respondent maintains that the statute is to the contrary. At the outset we wish to invite this Court's attention to the fact that the Patent Office was not functioning administratively in a patent matter. This was a disbarment proceeding.

The Statute (Title 35, Section 11, U. S. C.) empowers the Commissioner of Patents, after appropriate notice and hearing, to suspend a lawyer or exclude him from practice before the Patent Office because of gross misconduct.

Respondent invites the attention of the Court to that portion of the Statute which provides for judicial review of such proceedings. The opinion of the trial court, now affirmed by this Court, held that the review provided by statute was limited to whether there was substantial evidence to support the Commissioner of Patents ruling, as well as whether Dorsey had a fair hearing.

Review by the Court provided for in the pertinent statute is not the review of the action of an administrative tribunal in a matter where special knowledge or skill is reposed, such as a patent matter before the Patent Office, or a communications matter before the Federal Communications Commission, but the misconduct of a lawyer before the department which initiated, prosecuted and adjudged the proceedings. In the former case, review would depend upon the substantial evidence rule. In the latter, the purpose of judicial review is to insure independent and impartial review. That is the reason Congress changed the earlier statutes which provided for approval by the Secretary of the Interior to judicial review in the statute here pertinent.

Therefore, we submit that the District Court erred when it said: 69 F. S. 792

"At the outset it is of first importance to make clear the function of this Court in the present proceedings. It is not that of the trier of the facts; it is to review what has been done in the disbarment proceedings and

to determine whether or not the petitioners have had a fair hearing after due notice of the charge each was called upon to answer, and whether or not there is substantial evidence to support the action of the Commissioner of Patents."

Such a conclusion deprives the courts of the jurisdiction vested in them by Congress.

The Patent Act of 1861 (Section 8, 16 Stat. L. Chap. 230) provided that the Commissioner's action in such matters should be subject to approval by the President. The Patent Act of 1870 (R. S. 487) substituted approval by the Secretary of the Interior rather than the President. Judicial review, not administrative approval, became the law under the 1922 Act (Title 35, Sect. 11, U. S. C.).

In *Wedderburn v. Bliss*, 12 App. D. C. 486 (1898), which was decided prior to the provision for judicial review, the Court said:

"The provision that the judgment of the Commissioner shall 'be subject to the approval of the Secretary of the Interior,' does not make the Secretary a court for the trial of the case, nor does it make him in any proper sense an appellate tribunal before which it would be proper for a party in interest to demand and to be accorded a hearing. Such terms are nowhere in our legislation used for the creation of appellate judicial authority. They are most inapt terms for any such purpose, and they are equally inapt to constitute the Secretary the court of first instance, for which the findings of the Commissioner may serve as the findings of a referee or master in chancery. In the one case in our legislation in which similar or equivalent terms are used for the creation of supervisory quasi-judicial authority—the provision for the review of sentences of courts-martial by the President of the United States or by a commanding officer—it has never been heard of that such supervisory authority implies any right on the part of a person in interest to a hearing *de novo* before

such supervising power, notwithstanding that the exercise of the power is a quasi-judicial function.

"It is very clear to us that under this section 487 of the Revised Statutes, if it stood alone, the Commissioner of Patents, and not the Secretary of the Interior, constitutes the tribunal for the determination of cases of alleged malpractice occurring before his bureau, and that the hearing, to which an agent or attorney is entitled before exclusion from recognition, is to be had before the Commissioner. The authority of the Secretary is to review the record transmitted to him, and to give or refuse his assent to the Commissioner's recommendations, as he may think proper, and for any reason satisfactory to him. In other words, it is for the Commissioner to pass judgment; but that judgment is not to be given effect until it is approved by the Secretary."

But, it is noted that *approval only* was the statute when the above case was decided. Approval of court-martial proceedings by military authorities are final and, except for jurisdictional defects, cannot be reviewed by the civil courts. *Dynes v. Hoover*, 20 Howard 65, 15 L. Ed. 838, 844; *Mullen v. United States*, 212 U. S. 517, 520, 53 L. Ed. 632, 635. However, by the Act of 1922 (Title 35, Section 11), Congress substituted review by the Courts rather than approval by the Secretary of the Interior.

The legislative history of the 1922 Act (Volume 1, Serial No. 7920, H.R. 174, 67th Congress, 1st Session) indicates that the bar recommended review by the Court rather than approval by the Secretary. The change from administrative review by the Secretary to judicial review by the Court clearly indicates that it was the policy of Congress for a review of a more thorough nature than that provided for under the old law where the head of a department was approving the action of his subordinate.

Congress intended, in the amended statute, that the review of an order disbarring a patent attorney should be a

judicial review, rather than a mere "approval" by the head of an agency within the executive branch of the federal trilogy. In short, the review of an order of disbarment was declared by Congress to be a "judicial" rather than an "administrative" function. Nevertheless, this Court has upheld the decision of the District Court which failed to recognize that the review of an order of disbarment marks the initiation of the judicial process. That Court too narrowly circumscribed the orbit of review. The intent of Congress has been thwarted with the result that Dorsey has been denied the judicial review contemplated by the Congress.

The essential requisites of the scope of judicial review in disbarment proceedings was before the Court in the case of *In re Shattuck* (S. C. Cal., 1929) 208 Cal. 6, 279 Pacific 998. The statute which provided for review of the action of the Board of Bar Governors in disbarment proceedings provided: (Cal. Statutes 1927, p. 38.)

"Any person so disbarred or suspended may, within 60 days after the ruling, petition the Supreme Court to review said decision."

The Supreme Court of California held that such "review" meant a re-examination of the entire record as distinguished from the limited meaning of a writ of review or certiorari.

Again, in the case of *In re Scott*, decided by the Supreme Court of Nevada in 1930 (292 Pacific 291, 292), while interpreting a similar statute, the Court said:

"What is meant by the term review in this and other sections of the Act? —

"We are in accord with the authorities holding that the Supreme Court, on review of a decision of disbarment or suspension of an attorney by the Board of Governors of the State Bar, is not bound by the findings or recommendations made by a local Administrative

Committee, nor their adoption by the Board of Governors, and shall examine the entire record anew to ascertain whether or not any charge has been proven which merits disbarment or suspension."

In re Shattuck, 279 Pacific 998;

McVicar v. State Board of Law Examiners (D. C.)
6 F.(2) 33.

Likewise, in *In re McCue* (Supreme Court, Mont. 1927) 80 Mont. 537, 261 Pacific 341, the Montana Supreme Court held that statutory actions to review disbarment proceedings were intended to be judicial examinations similar to the review of the action of a lower court by a higher tribunal.

Because of the review by the courts as provided by statute and because the trial court felt that its jurisdiction was limited to whether there was substantial evidence to support the conclusion of the Commissioner of Patents, the respondent respectfully submits that this Court erred in determining this cause on the "substantial evidence" or the "substantial probative evidence" rule applicable to administrative bodies.

The trial court should have determined whether the facts presented to the Commissioner warranted disbarment. The Court of Appeals was correct when it said: 172 F. (2) 408.

"The majority of this court are of the opinion that the learned trial court takes altogether too narrow a view of its own jurisdiction. It proceeds upon the theory that the case is one for the strict and extreme application of the doctrine of 'administrative finality'."

The cause should be returned to the trial Court for appropriate determination as required by statute.

This Court, in its opinion herein, said: 18 L.W. 4032-4033.

"We agree with the following statement made by the Patent Office Committee on Enrollment and Disbar-

ment that considered this case: 'By reason of the nature of an application for patent, the relationship of attorneys to the Patent Office requires the highest degree of candor and good faith. In its relation to applicants, the Office . . . must rely upon their integrity and deal with them in a spirit of trust and confidence. . . . ' It was the Commissioner, not the courts, that Congress made primarily responsible for protecting the public from the evil consequences that might result if practitioners should betray their high trust. Having serious doubts as to whether the Court of Appeals acted properly here in nullifying the Commissioner's order, we granted certiorari.

"After an examination of the record we are satisfied that the findings were amply supported whether the measure be 'substantial evidence' or 'substantial probative evidence.' "

The vice of this conclusion, we respectfully submit, is that the Court is not passing upon a ruling by an administrative agency in a matter in which that agency has peculiar skill or knowledge. (*Swayne and Hoyt v. U. S.*, 300 U. S. 297, 303; 81 L. Ed. 659; *Rochester v. U. S.*, 307 U. S. 125, 145, 146; 83 L. Ed. 1147). Here the Patent Office was not determining the validity of a patent in which field presumably it was skilled, but adjudged Dorsey guilty of professional misconduct. The statute gives Dorsey a "review" in such a matter which, so far, has been denied him on the theory of administrative finality.

Courts license qualified attorneys to practice. Courts disbar attorneys for misconduct. The right to practice before an administrative agency is a valuable property right, no less valuable than the right to practice before a court. The withdrawal of such right in this case, as in many others, is the extreme penalty that may be visited upon a practitioner. Congress was aware of this. In order to safeguard the rights of those who practice before the Patent

Office, as well as to protect the public interest, it conditioned the withdrawal of this right on a full and fair hearing before the Patent Office, and a full and complete judicial review by the District Court. The logic and propriety of this statutory scheme is apparent. When an administrative agency orders disbarment, it is not performing a function, or acting in a capacity in which it is presumed to have either expert knowledge or the peculiar fitness upon which the so-called doctrine of "administrative finality" has been based. Rather, in such case the administrative agency is embarked upon the performance of a function which requires knowledge and judgment far afield from the speciality in which it is skilled.

For example, the Federal Communications Commission, Interstate Commerce Commission, Federal Trade Commission and Securities and Exchange Commission, and many others are tribunals vested by Congress with the right to determine certain issues. In such matters those bodies are presumed to have intimate knowledge in their particular field. It is only in those matters that an administrative order of the appropriate tribunal will not be set aside by the Courts when substantial evidence supports the findings cf. *Halloway v. R.R.B.*, 44 F. S. 59, 62.

Let it not be said that Dorsey was not disbarred. He was disbarred from the only practice in which he was skilled and in the vineyard where he has labored long and honorably (over 50 years).

If this was an administrative proceeding, the "substantial evidence rule" would apply or, if one wishes, "the substantial probative evidence" rule. Both mean the same. All evidence is for purposes of proof. The phrase "substantial probative proof" was born during the debates on the Administrative Procedure Act in the legislative halls

of Congress. There occurred a discussion between Senators Ferguson and McCarran as to the distinction between the "scintilla of evidence" rule and the stronger proof required under the review provided by the then proposed Administrative Procedure Act. In the legislative history of the Act, we find the following:

"Mr. Ferguson. 'Would the Senator then, say that the judgment or decision of the agency must be based upon stronger proof than a scintilla of evidence?'"

"Mr. McCarran. 'Very much stronger.'"

"Mr. Ferguson. 'The old rule which applied in the courts, particularly on certiorari, was that if there was any evidence to sustain the verdict or judgment, it should be sustained. The courts have many times so held. The Senator would say, would he not, that something more than "any evidence" is required to sustain such a decision.'"

"Mr. McCarran. 'The answer is in the affirmative. We say that the evidence must be substantial probative evidence.'"

"Mr. Ferguson. 'So we are changing the rule which has been applied in the past that any evidence, or a scintilla of evidence, as it is sometimes defined, is sufficient to sustain a verdict or judgment.'"

"Mr. McCarran. 'We tried as best we could to establish a guide for administrative groups so that they would apply the rule in such a way that there be substantial probative evidence behind their findings, and so that they could say, "We are not afraid to have our findings reviewed by a court," * * *'"

"Mr. George. 'The courts have many times held that if there is any evidence to sustain the finding of an administrative board under the statute, the courts have no power to intervene. If this bill should become a law would that rule, as heretofore construed by the courts, remain in effect?'"

"Mr. McCarran. 'The courts have given various constructions. The courts, in reviewing an order, are

governed by the provisions of section 10(e), which states the substantial-evidence rule. In other words, in some instances the courts have held that there must be substantial evidence. We are saying that there must be probative evidence of a substantial nature, and that even though the commission or bureau may take hearsay evidence in its hearings, it must have some probative evidence to sustain its finding.'

"Mr. George. 'The point I wish to raise is that some of the acts of Congress, particularly those enacted in recent years, have led the courts to hold—and they so hold—that if there be any evidence to sustain the finding of a board or agency, the court has no power to interfere with it.'

"Mr. McCarran. 'I would put it in this way——'

"Mr. George. 'Would the enactment of this bill require some substantial or probative evidence to support such a finding?'

"Mr. McCarran. 'Yes.'

"Mr. George. 'Take the labor relations cases. Senators are familiar with them. The Circuit Courts have frequently complained against what the Labor Relations Board did, but have said, "We are powerless to interfere with it" Would this bill change that rule, if the court were of the opinion that there was no probative evidence?'

"Mr. McCarran. 'Yes; it would change that rule.'

"Mr. George. 'I am pleased to hear it.' "

In view of the foregoing, it is respectfully submitted that the trial Court erred in holding:

"At the outset it is of first importance to make clear the function of this Court in the present proceedings. It is not that of the trier of the facts; it is to review what has been done in the disbarment proceedings and to determine whether or not the petitioners have had a fair hearing after due notice of the charge each was called upon to answer, and whether or not there is substantial evidence to support the action of the Commissioner of Patents." 69 Fed. Supp. 788, 792.

Substantial evidence to support the action of the Commissioner of Patents was not the guide for the trial Court. Dorsey was entitled to but was not afforded the judicial review provided by Statute.

The order of disbarment is fatally defective and the judgment sustaining it is likewise fatally defective, for the further reason that Dorsey and the others involved with him in this proceeding, were treated as co-conspirators in that the evidence adduced as to one was considered in determining the guilt of the others, including Dorsey. This pattern of proof was specifically held to be reversible error in *General Foods Corp., et al., v. Brannan, et al.*, 170 F. (2) 220, 224-5 (C. C. A. 7th, 1948). In this case, Major, Circuit Judge, speaking for a unanimous court which included the then Circuit Judge (now Associate Justice) Minton and Briggles, District Judge, held (at page 224, col. 2, and at page 225, col. 1):

"But no court, so far as we are aware, and we do not propose to be the first, has held in *an administrative proceeding* or any other kind that one person can be held responsible for the actions and statement of another in the absence of a conspiracy or agreement." (Emphasis added.)

If the writ herein was providently granted, this Court should either affirm the Court of Appeals or remand the case to the trial Court for decision on the merits.

Respectfully submitted,

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I hereby certify that the foregoing petition is filed in good faith and not for purposes of delay.

JAMES F. REILLY.

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